

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 9

HRVW HUNTINGTON, INC.,  
D/B/A HERITAGE CENTER <sup>1/</sup>

Employer

and

Case 9-RC-17981

THE HEALTH CARE AND SOCIAL SERVICE  
UNION, SEIU, DISTRICT 1199,  
WV/KY/OH, AFL-CIO <sup>2/</sup>

Petitioner

**REGIONAL DIRECTOR'S DECISION AND  
DIRECTION OF ELECTION**

The Petitioner filed a petition with the National Labor Relations Board seeking to represent a unit comprised of the approximately 19 licensed practical nurses (LPNs) employed by the Employer at its Huntington, West Virginia facility, excluding all registered nurses (RNs), all employees currently represented by the Petitioner and all managers, [all other supervisors and guards] as defined in the Act. The Petitioner currently represents a unit of all full-time and regular part-time service and maintenance employees employed at the Employer's facility, including nurse aides (CNAs), ward clerks, physical therapy aides, dietary employees, housekeeping employees, laundry employees, maintenance employees and activity assistants. There is no known history of collective bargaining affecting the LPNs involved in this proceeding.

A hearing officer of the Board held a hearing on the issue raised by the petition, and both the Employer and the Petitioner filed post-hearing briefs with me. The parties disagree with respect to the supervisory status of the LPNs, which is the only issue involved in this case. The Employer, contrary to the Petitioner, asserts that all LPNs employed at its facility are statutory supervisors possessing one or more of the indicia set forth in Section 2(11) of the Act. The Employer's claim that the LPNs are statutory supervisors is primarily predicated on the assertion that they assign and responsibly direct the work of certified nurse's aides (CNAs), transfer the CNAs using discretion, approve overtime for CNAs, discipline CNAs when necessary, and prepare or provide input in the evaluations of the CNAs. In addition, the Employer maintains that the supervisory status of the LPNs is buttressed by the existence of various secondary indicia of supervisory authority. Neither party contends, and the record does not reflect, that the LPNs

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<sup>1/</sup> The Employer's name appears as amended at the hearing.

<sup>2/</sup> The Petitioner's name appears as amended at the hearing.

have the authority to hire, lay off, recall, promote, discharge or reward any employees of the Employer.

I have carefully considered the evidence and the arguments presented by the parties at the hearing and in their briefs and have concluded, as discussed in detail below, that the record does not support the Employer's contention that the LPNs are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I will direct an election in a unit comprising the Employer's LPNs. To provide a context for my discussion of the issue, I will first provide an overview of the Employer's operations, including detailed facts about the duties and authority of the LPNs. I will then summarize the relevant case law governing the requirements for establishing supervisory status and present the facts and reasoning that support my conclusion on the issue.

#### I. Overview of the Employer's Operations and Summary of Facts:

The Employer operates a 120-bed direct care nursing facility providing around-the-clock care to its residents.<sup>3/</sup> The facility is a one-level triangular structure. The administrative offices are located in the front of the facility near the entrance, and the two residential care areas - referred to as the North and South units - are located in the rear portion of the building. There is one nursing station on each unit. There is no difference in the level or skill of care provided to the residents in either of the units.

The Employer's administrator, Anthony Mollica, is in charge of the day-to-day operation of the facility and is the highest ranking manager employed in the facility. There are eleven managers who report directly to Mollica: (1) Assistant Administrator Cindy Cooper; (2) Office Manager Teresa Helmondollar; (3) Director of Housekeeping Bryan Roten; (4) Director of Admissions John Gibson; (5) Director of Social Work LeAnn Terango; (6) Director of Activities Carol Peters; (7) Director of Maintenance Tony Wallace; (8) Director of Dietary Rosa Ray; (9) Clinical Review Coordinator Norene Starkey (head of the Minimum Data Set Department); (10) Director of Records Nancy Spencer; and (11) Director of Nursing Jana Postin. The parties stipulated, and the record reflects, that all of these individuals are supervisors within the meaning of the Act.

Postin is responsible for the entire nursing department. She normally works Monday through Friday, from 8 a.m. to 5:30 p.m., but is on call 24 hours a day, 7 days a week. Additionally, Postin and each of the other department managers are required to work weekends, for 5 to 6 hours each day, on a rotating basis. There are two unit managers in the nursing department - Cathy Harris and Donna Moore - who work directly under Postin. The parties stipulated, and the record reflects, that they are statutory supervisors. Harris and Moore are RNs and manage the North and South units, respectively. They are responsible for overseeing their respective units, which includes supervising the LPNs and CNAs on the unit, coordinating care of the residents, assisting with admissions and discharges and certain administrative duties. Harris and Moore generally work from 8 a.m. to 4 p.m., Monday through Friday. They also participate in the weekend work rotation with the other department heads. RN Sharon Leap is

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<sup>3/</sup> The Employer is licensed to accommodate 160 residents, but it has not yet completed this expansion.

the staff development coordinator and directs staff in-services and is responsible for orientation of new employees. She works Monday through Friday, however, the record does not indicate her hours or to whom she reports. RN Dianna Blevins is a restorative nurse and reports directly to Postin. Blevins works in a designated restorative area and oversees the work of the four CNAs assigned to that area. She works from 7 a.m. to 3:30 p.m., Monday through Friday; the restorative area does not operate on weekends.

Working under Moore and Harris are the second shift RN, Sandy Peterman, the third shift RN, Linda Barnett, and a charge nurse, LPN Vanessa Blevins. The parties stipulated, and the record reflects, that Peterman and Barnett are supervisors within the meaning of the Act. Although the record does not clearly indicate that the parties stipulated regarding Vanessa Blevins' supervisory status, I note that both the Petitioner and the Employer state in their briefs that the parties stipulated that she was a statutory supervisor. Moreover, there is unrebutted testimony in the record that she has the same duties and possesses the same authority as Peterman and Barnett. Although not dispositive of her supervisory status, I note that Vanessa Blevins earns more per hour than the other LPNs and has a different job description. Based on the foregoing, and the apparent agreement of the parties that Blevins is a supervisor, I will exclude her from the unit.

Peterman, Barnett and Blevins oversee the nursing units during their shifts. They are "in charge of the building," in case of an emergency, and are responsible for coordinating the care of the residents, overseeing admissions and discharges, and performing other administrative and clinical duties. They conduct various audits, such as checking to see if residents are turned and repositioned, review physician's orders for compliance and review charts to ensure entries have been transcribed correctly. Peterman works 3 p.m. to 11 p.m. on 2 out of 5 weekdays and 11 a.m. to 7 p.m. every weekend (Saturday and Sunday). Barnett works 11 p.m. to 7 a.m., Monday through Friday. Blevins works 3 p.m. to 11 p.m., 5 days a week; although, the specific days she works alternate weekly. Blevins also works every other weekend. On the weeks that she is assigned to work weekends, she works only three weekdays. On the weeks that she is not assigned to work weekends, she works Monday through Friday. To the extent the work hours of Peterman, Barnett and Blevins occur during intervals that the DON and two unit managers are not scheduled to work, they are "in charge" of the nursing department.

In addition to the approximately 19 LPNs,<sup>4/</sup> there are 45 CNAs, including the four CNAs who work under Dianna Blevins in the restorative area. There are two LPN shifts: 7 a.m. to 7 p.m. and 7 p.m. to 7 a.m. The Employer staffs each of these shifts with four LPNs, assigning two each to the North and South units. There are three CNA shifts: 7 a.m. to 3 p.m. (day), 3 p.m. to 11 p.m. (evening) and 11 p.m. to 7 a.m. (night). The Employer typically schedules its CNAs as follows: 13 CNAs on the day shift (7 on North unit and 6 on South unit); 11 CNAs on the evening shift (6 on North unit and 5 on South unit) and 6 on the night shift (3 on each side). The North unit typically has 10 more residents than South unit.

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<sup>4/</sup> Director Mollica testified that the Employer employs a total of 21 LPNs, including Vanessa Blevins and Director of Records Nancy Spencer, an admitted supervisor. Because these two are supervisors, and based on the fact that Spencer does not work in the nursing department, I have not included them in the count.

The Employer utilizes “house supervisors” during the evenings and weekends when no department directors or upper level supervisors are present. In the nursing department, this role is typically assumed by the supervisory nurses, Peterman, Barnett and Blevins. However, when these three supervisors are not working, the most senior LPN on shift normally assumes the responsibility of house supervisor. During the weekdays, there is an admitted supervisor present on the nursing units almost around the clock, except from about 7 a.m. to 8 a.m. or 8:30 a.m. every morning and from 5 p.m. to 11 p.m. on two evenings every other week. During the weekends, there is an admitted supervisor present except for the following times: Saturdays from 7 a.m. to 11 a.m. and from 11 p.m. to 7 a.m. the next day; every other Saturday from 7 p.m. to 11 p.m.; Sundays from 7 a.m. to 11 a.m. and from 11 p.m. to 8 a.m. the next day; and, every other Sunday from 7 p.m. to 11 p.m.

Although the Employer does not have a written policy regarding the house supervisors, based on the testimony of various witnesses, the house supervisor has control of the keys to central supply, conference rooms and the elevators. They also have control of the “blue book,” which contains information pertaining to the nursing department, e.g., important phone numbers, an employee roster and procedures for filling vacancies when staffing falls below the state-mandated minimum. The designated house supervisor is responsible for taking “call-offs” from nursing department employees and filling vacancies created by the call-offs. The LPNs are sometimes designated by an admitted supervisor that they are the house supervisor. On other occasions, they find out only when the keys are placed in their cart. LPNs sometimes, but not always, receive a \$.50 an hour pay differential for filling the house supervisor role.

CNAs start at about \$8.25 an hour. LPNs earn between \$14 and \$16 an hour. The LPN supervisor (Blevins) earns between \$16 to \$18 an hour and the RN supervisors earn between \$18 and \$21 an hour. The Employer requires RNs and LPNs to complete a requisite nursing program and to be licensed by the State of West Virginia. The Employer requires CNAs to be certified by the state and maintain the certification in good standing. According to DON Postin, CNAs do not have to meet any minimal education requirements, but the job description indicates that a high school or high school equivalency diploma is preferred.

Most of the testimony centered on the LPNs’ interaction with the CNAs. Thus, there is only scant evidence in the record regarding the extent to which LPNs interact with non-nursing department employees. LPN Vickie Adkins testified that, while acting as house supervisor, she had to talk to a laundry employee after a CNA notified her that the laundry department had failed to provide clean linens. Adkins stated that she did not have any authority to require the laundry employee to release the linens. Rather, she signed a check-out sheet verifying that the linens had been released when requested to do so by the laundry employee.

CNAs provide most of the direct care to residents and are responsible for assisting the residents with their daily activities. The daily activities are of a routine nature and generally governed by a schedule. These activities include showering, dressing, changing, feedings and turning the residents, as well as cleaning and maintaining residents’ rooms and living environment. CNAs take food trays to residents and assist them if they are unable to feed themselves. CNAs also chart the residents’ activities of daily living (“ADL”) in the ADL book, (e.g., the amount of food intake; whether the residents have showered or bathed; bowel

movements; and, the liquid intake and output) and take and chart vital signs. The record reflects that when the CNAs are assigned to the restorative area, they work exclusively under the restorative nurse and assist her with ambulating and other activities for residents who have had physical or occupational therapy.

## II. The Duties and Responsibilities of the LPNs:

The LPNs are primarily responsible for providing direct nursing care to residents. They spend a large portion of their time dispensing medications, referred to as “med passes,” which typically requires 1-2 hours to complete each time. There are three med passes during the 7 a.m. to 7 p.m. shift and two med passes during the 7 p.m. to 7 a.m. shift. LPNs also take blood sugar readings, perform various treatments and apply dressings, creams and lotions according to pre-set schedules. LPNs have various charting responsibilities, including charting the skills of the residents, and ensuring that CNAs do their charting and otherwise complete their daily tasks. The LPNs are responsible for interacting with the families of residents, physicians, and assist the physicians on their rounds as needed. In addition to providing direct nursing care, LPNs also are involved in resident admissions and discharges.

The nursing secretary is a clerical employee and prepares a 4-week schedule, which displays the dates that CNAs are scheduled to work during that period. The schedule is reviewed by DON Postin. Although the record is not clear on this point, apparently the LPNs are scheduled in a similar manner. The 4-week schedule does not specify the CNA’s assignments. Rather, prior to the start of each shift, one of the two LPNs on each unit completes a daily assignment sheet for the CNAs in their respective unit. The daily assignment sheet is a blank, pre-printed form that contains space for the LPNs to fill in their own assignment - Assignment A or B (which refers to a particular end of the hallway on their unit) and CNA Assignments 1, 2, 3, etc. up to Assignment 6. The LPNs work the same assignment every day. Similarly, the CNAs work the same end of a particular unit every day. For each CNA assignment, the LPN fills in the CNAs’ names, the group of rooms to which they are assigned; any “other duties” for which they might be responsible for that day; and, their break and meal times. The record does not disclose whether, or how, the LPNs decide who on each unit will complete the assignment sheet. LPN Marlene Stapleton testified that both she and her co-LPN do the assignment sheets. She added that, at times, a night shift LPN will prepare the assignment sheet for her shift.

Typically, LPNs assign the CNAs to the same group of rooms each day, with some deviation based on the census in each room and whether vacancies are created by call-offs. There are 4 beds in each room. Similarly, LPNs assign the CNAs to the same break and lunch periods each day, which are pre-set by the Employer. For example, the CNAs on the 7 a.m. to 3 p.m. shift take their morning break at either 9 or 9:15 a.m., their lunch at either 10:30 or 11 a.m. and their afternoon break at either 2 or 2:15 p.m. Occasionally, the CNAs deviate from their normal break or lunch time if dictated by their work load. In such instances, the CNA will typically ask the LPN if she cares whether the CNA takes a later lunch or break. As long as the CNA can cover assigned tasks, the LPN normally has no problem with the request. There is no indication in the record that LPNs have ever required CNAs to change their lunch or break time in order to perform a work task.

The witnesses named below provided testimony regarding the typical process that LPNs undertake in making room assignments: DON Postin explained that the LPNs divide the assignments based on the number of CNAs that are scheduled to work on a given shift and the census in each room, with the same CNAs working the same rooms the majority of the time. LPN Beth Chafin testified that she divides the number of residents by the number of CNAs on the shift and, . . . “For the most part its the same thing every single day.” LPN Marlene Stapleton stated that she keeps the CNAs on the same assignments. CNA Samantha Ferguson, who has worked for the Employer for 4½ years, testified that she had filled out assignment sheets, including the LPN assignments, “more than 10 times” within a couple of weeks or months prior to the hearing. She added that, as a CNA, she did not really need to look at the assignment sheets to know her room assignments.

The “other duties” referenced in the assignment sheets include a.m. and p.m. dining room duty; cleaning the utility room; checking the shower room for cleanliness; and, passing snacks and ice to residents. CNAs may be assigned one of these duties on any given day. According to LPN Chafin, when making the assignments for “other duties,” she just “fill[s] it in” and does not differentiate among the CNAs or base her assignments on whether someone is better at a certain duty. LPN Stapleton testified that the CNAs are usually present for the pre-shift meeting when she fills out the sheet and she asks for volunteers. Stapleton added that the CNAs volunteer the majority of the time, but she will fill the slot herself if no one volunteers. LPN Nekol Frazier testified that she assigns the “other duties” based on the proximity of the CNA’s room assignments to the designated task. Frazier added that she, her co-LPN and the CNAs typically convene and divide the tasks up at the beginning of the shift.

The showering and bathing of residents is performed according to a schedule prepared by the ward clerk. The ward clerk classification is included in an existing bargaining unit represented by the Petitioner. Each CNA is responsible for checking the “shower book” to determine those residents who need to be bathed or showered each day.

When unscheduled absences, referred to as “call-offs,” or tardiness create a short-staffing situation, LPNs have called CNAs in to work early, transferred them between units and/or mandated them to work past their scheduled shift. However, the Employer’s scheduler, Teresa Spencer, is primarily responsible for filling vacancies created by “call-offs” or tardiness. Spencer works during the day. In the evenings and during weekends Barnett, Peterman and Blevins perform this function. When none of these supervisors are present, the LPN who has been designated “house supervisor” performs this duty. The collective-bargaining agreement governing the CNAs’ terms and conditions of employment authorizes the Employer to mandate the least senior person in an affected classification if a scheduled employee fails to report to work and the Employer needs to fill the vacancy. This contractual provision specifies that the Employer will first attempt to fill any vacancy by calling off-duty employees. The record reflects that LPNs follow this procedure when CNAs are required to report to work to fill vacancies resulting from “call-offs.” LPNs first seek out volunteers among both on and off-duty employees who have made known their desire for extra work. In the absence of volunteers, LPNs mandate the least senior CNA in the building to fill the vacancy pursuant to the aforementioned contractual provision.

The LPNs do not have the authority to add more than the allotted number of CNAs on each shift, nor is there any evidence that they have ever mandated in situations where staffing is at or above the minimum level required. However, there have been instances where the LPNs have temporarily pulled or transferred CNAs between units, even when the minimum staffing level has been met. This typically occurs when one of the units is short staffed. For example, 11 CNAs report for the day shift (the minimum staffing level for that shift), but the North Unit is fully staffed with 7 CNAs while the South Unit has only 4 CNAs. Under such a scenario, the LPNs check the census to determine if a transfer is warranted and, if so, “pull” one or more CNAs from the fully-staffed unit and typically place the “pulled” CNA in the less-staffed unit.

LPNs are not authorized to effectuate permanent transfers, which must be authorized by the DON or accomplished through a bidding procedure. DON Postin testified that the LPNs assign newly hired CNAs, even if an admitted supervisor is present, although she was unable to cite any specific examples of this occurring, nor did she describe the process by which a LPN could make such an assignment.

While doing their med passes and performing other duties on the floor, LPNs check to ensure that the residents have received their requisite care from the CNA, (e.g., whether meal trays have been passed or cleared; whether residents have been shaved, turned or showered as scheduled; and, whether residents’ rooms have been cleaned). If these tasks have not been performed, the LPN will either do the work, if time permits and the CNA is not in the immediate vicinity, or locate the CNA and remind her that she needs to complete the task. The record discloses that two of the four LPNs who testified generally do the work while the other two normally have the CNA involved complete the task. All of the LPNs testified that they possess the authority to, and have, directed CNAs to complete their assigned tasks.

There is conflicting evidence as to whether LPNs have the authority to discipline CNAs who fail to abide by their instructions to complete a task. The LPNs’ authority to discipline, or lack thereof, is discussed in more detail below. I note here, however, that LPN Chafin, who testified that she has the authority to discipline, acknowledged that she did not discipline the least senior CNA on a shift who refused a mandate in a situation when the Employer was below minimum staffing levels.

The Employer also provided a number of LPN evaluations in support of its contention that LPNs are evaluated on their ability to “supervise” the CNAs who are assigned to work with them and whether the LPNs ensure that the CNAs complete their tasks. However, there is no record evidence that the Employer disciplines LPNs for failing to properly correct or counsel a CNA with deficient performance. Moreover, there is no evidence that LPNs have ever disciplined a CNA for work deficiencies. Finally, the evaluations do not indicate whether the Employer has ever rewarded LPNs according to their ability to “supervise” CNAs.

There is also conflicting evidence regarding whether the LPNs can require CNAs to work overtime if they fail to complete their duties during their regular shift. DON Postin testified that LPNs may require CNAs to stay past their shift to complete paperwork, but the record contains no specific examples of LPNs ever exercising such authority. I note that there are 18 documented instances in the record in which a LPN has signed an “Approval For Early/Late

Punch Overtime” sheet on the line designated for the “supervisor’s signature.” LPN Frazier signed 17 of these documents, but concedes that the Employer has never told her that she has the authority to approve overtime. According to LPN Frazier, she simply signs the overtime sheets, which are filled out by the CNA, to verify that the CNA worked the overtime indicated on the sheet. The sheet is returned to the CNA, who is responsible for placing it in a designated box. Frazier could not recall the specific circumstances surrounding the overtime sheets that she signed, except for three resulting from mandating situations. The record indicates that in most cases the CNAs wrote that either an unnamed “supervisor” or Teresa Spencer asked them to stay late or come in early because a shift was “short-staffed” or because “help [was] needed.” It is not clear whether the unnamed “supervisors,” to whom the CNAs referred, were LPNs.

In the three instances Frazier signed an overtime sheet for a CNA, two situations involved CNAs staying for an extra half hour and the third occasion the CNA stayed for an extra hour. Frazier could not recall whether she had given the CNAs’ prior approval to stay past the end of their shift, but she testified that she would customarily sign the overtime sheets if the CNAs told her that they had not finished their duties. CNA Basenback testified that if she fails to complete her paperwork by the end of her shift she “just knows to stay” and asks her LPN or the “charge nurse” to sign her overtime sheet.

Although the Employer does not contend that LPNs have the authority to approve leave, it elicited testimony concerning a single incident in which a LPN permitted a CNA with a family emergency to leave, after the CNA asked for the house supervisor so she could obtain permission to leave work. In the cited instance, the LPN told the CNA to leave and that she would notify the house supervisor.

The evidence is conflicting as to whether LPNs have the independent authority to discipline CNAs. DON Postin and LPNs Chafin and Stapleton testified that LPNs possess such authority. LPNs Frazier and Adkins and CNA Basenback testified that LPNs do not have such authority and that the Employer has never told them that LPNs have such authority. CNA Samantha Ferguson testified that she did not understand LPNs to have the authority to discipline, but admits that Chafin told her that LPNs had such authority.

The conflicting testimony concerning the authority of LPNs to discipline CNAs is cleared up somewhat by the 11 corrective counseling forms introduced by the Employer which purport to show that LPNs have such discretion. In relevant part, each form contains a section on which to describe the infraction that gave rise to the corrective action; a section to check the level of discipline, if any, meted out; and, three signature lines - one each for a “supervisor,” a “witness” and the employee being disciplined. Only 4 of the 11 actions were placed in context by testimonial evidence and are truly probative of whether LPNs possess the authority to discipline within the meaning of Section 2(11) of the Act. There are two verbal warnings signed by LPN Vanessa Blevins before she was promoted to charge nurse; a verbal warning signed by LPN Stapleton; and, one that Chafin signed as a witness. Regarding the seven corrective action forms for which there was no corresponding testimonial evidence, in four cases an admitted supervisor signed or co-signed on the designated supervisor’s line, with LPNs signing only as witnesses. The remaining corrective actions, two verbal warnings and a suspension dating back to 2002, were admittedly signed by LPNs on the designated supervisor’s signature line. However, DON



Postin, through whom the documents were admitted, had no knowledge of the circumstances surrounding the issuance of these disciplinary actions or whether the LPNs actually filled them out or consulted with admitted supervisors prior to issuance. According to Postin, the corrective actions are placed in employees' personnel files and may be used as a basis for further discipline, but the Employer did not offer any record evidence that this has ever occurred.

The two corrective actions signed by Blevins date back to July 2004, prior to the time that she was promoted to her current supervisor's position. They are both verbal warnings issued to CNAs who allegedly clocked in or out prior to the permitted 7-minute window period. Postin testified that it was the payroll department that detected the infractions. Moreover, the record reflects that Assistant Administrator Cindy Cooper actually filled out the warnings and directed Blevins to issue them to the employees. CNA Ferguson received one of these verbal warnings and testified that Blevins told her that "they" had instructed her to issue the warning.

The verbal warning LPN Stapleton signed is dated April 2001 and is also signed by RN Supervisor Barnett as a witness. Stapleton did not have a good recollection of the incident prompting the issuance of this warning, but the warning indicates that it resulted from a CNA's failure to change a resident when asked to do so. The warning itself does not specify who asked the CNA to change the resident and Stapleton could not recall whether she discussed the action with Barnett before issuing it to the CNA. Stapleton testified that two LPNs could issue a corrective action without the presence of a supervisor, but admitted that to her knowledge this has never happened. Stapleton stated further that she has issued other disciplinary actions, but she could not recall any other specific instances.

LPN Chafin signed a corrective action as a witness, while RN Barnett's signature appears on the supervisor's line. Chafin explained that she filled out the corrective action after learning of the incident. She subsequently contacted Barnett and learned that Barnett already knew about the incident and had also filled out a corrective report. They decided to issue the corrective action to the CNA together and to use the form that Chafin had completed. It is unclear from Chafin's testimony why she signed the action as a witness rather than a supervisor. Barnett did not specify what discipline was invoked on the corrective action form and there is no record evidence addressing this omission.

The Employer maintains that the LPNs have in the past completed performance evaluations of CNAs and continue to provide input to unit managers who currently prepare such evaluations. I note that the only CNA evaluations in the record signed by LPNs are stale and, in addition, are also approved by admitted supervisors. Moreover, the evaluations do not reflect a recommendation regarding pay increases or any other type of employment actions affecting the CNA.

The Employer asserts that the LPNs' job descriptions requiring them to "supervise" aides, for which they are evaluated, provide a secondary indicia of LPNs' supervisory status. The job descriptions state that the LPNs will "assist in the orientation and supervision of nursing personnel" and that they, "Supervise[] and coordinate[] nursing personnel in providing direct customer care in adherence to state, federal and corporate guidelines." They have also been

evaluated on such tasks as “ensur[ing] CNAs have completed tasks,” being “more assertive with CNAs,” and “CNA supervision.”

The Employer also argues that the fact that the LPNs take “call-offs” is indicative of their supervisory status. Taking call-offs entails filling out an absentee report with the name of the employee calling off, the reason for the call-off and the date and time that it was received. Call-offs that occur during the day are typically taken by the scheduler, who fills the vacancy if necessary. On evenings and weekends the house supervisor, including the LPN assigned to that position, takes the call-offs. The record discloses that the LPNs do not have the authority to require employees who are calling off to come into work, or to otherwise take any corrective action in relation to the call-offs. If the call-offs cause the CNA staffing to fall below the minimum level, LPNs may mandate or transfer employees in accordance with established procedures.

Finally, the Employer notes that CNAs have named various LPNs in grievances filed under the collective-bargaining contract covering the CNAs. The Employer maintains that this reflects that the CNAs view the LPNs as supervisors and constitutes secondary indicia of supervisory authority.

### III. The Law and its Application:

Before analyzing the specific duties and authority of the LPNs, I will review the requirements for establishing supervisory status. Section 2(11) of the Act defines the term supervisor as:

Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To meet the definition of a supervisor set forth in Section 2(11) of the Act, a person needs to possess only one of the 12 specific criteria listed, or the authority to effectively recommend such action. *Ohio Power Co. v. NLRB*, 176 F.2d 385 (6<sup>th</sup> Cir. 1949), cert. denied, 338 U.S. 899 (1949). The exercise of that authority, however, must involve the use of independent judgment. *Harborside Healthcare, Inc.*, 330 NLRB 1334 (2000). Thus, the exercise of “supervisory authority” in merely a routine, clerical, perfunctory or sporadic manner does not confer supervisory status. *Chrome Deposit Corp.*, 323 NLRB 961, 963 (1997); *Feralloy West Corp. and Pohng Steel America*, 277 NLRB 1083, 1084 (1985).

Possession of authority consistent with any of the indicia of Section 2(11) is sufficient to establish supervisory status, even if this authority has not yet been exercised. See, e.g., *Pepsi-Cola Co.*, 327 NLRB 1062, 1063 (1999); *Fred Meyer Alaska*, 334 NLRB 646, 649 at fn. 8 (2001). The absence of evidence that such authority has been exercised may, however, be

probative of whether such authority exists. See, *Michigan Masonic Home*, 332 NLRB 1409, 1410 (2000); *Chevron U.S.A.*, 308 NLRB 59, 61 (1992).

In considering whether the LPNs possess any of the supervisory authority set forth in Section 2(11) of the Act, I am mindful that in enacting this section of the Act, Congress emphasized its intention that only supervisory personnel vested with “genuine management prerogatives” should be considered supervisors, and not “straw bosses, leadmen, set-up men and other minor supervisory employees.” *Chicago Metallic Corp.*, 273 NLRB 1677, 1688 (1985). Thus, the ability to give “some instructions or minor orders to other employees” does not confer supervisory status. *Id.* at 1689. Such “minor supervisory duties” do not deprive such individuals of the benefits of the Act. *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 280-281 (1974), quoting Sen. Rep. No. 105, 80<sup>th</sup> Cong. 1<sup>st</sup> Sess., at 4. In this regard, the Board has frequently warned against construing supervisory status too broadly because an individual deemed to be a supervisor loses the protection of the Act. See, e.g., *Vencor Hospital – Los Angeles*, 328 NLRB 1136, 1138 (1999); *Bozeman Deaconess Hospital*, 322 NLRB 1107, 1114 (1997).

Proving supervisory status is the burden of the party asserting that such status exists. *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711-712 (2001); *Arlington Masonry Supply*, 339 NLRB No. 99, slip op. at 2 (2003); *Michigan Masonic Home*, 332 NLRB at 1409. As a general matter, I note that for a party to satisfy the burden of proving supervisory status, it must do so by “a preponderance of the credible evidence.” *Star Trek: The Experience*, 334 NLRB 246, 251 (2001). The preponderance of the evidence standard requires the trier of fact “to believe that the existence of a fact is more probable than its non-existence before [he] may find in the favor of the party who has the burden to persuade the [trier] of the fact’s existence.” *In re Winship*, 397 U.S. 358, 371-372 (1970). Accordingly, any lack of evidence in the record is construed against the party asserting supervisory status. See, *Williamette Industries, Inc.*, 336 NLRB 743 (2001); *Michigan Masonic Home*, 332 NLRB at 1409. Moreover, “[w]henver the evidence is in conflict or otherwise inconclusive on a particular indicia of supervisory authority, [the Board] will find that supervisory status has not been established, at least on the basis of those indicia.” *Phelps Community Medical Center*, 295 NLRB 486, 490 (1989). Consequently, mere inferences or conclusionary statements without detailed specific evidence of independent judgment are insufficient to establish supervisory status. *Sears, Roebuck & Co.*, 304 NLRB 193 (1991).

The Employer asserts that the LPNs are statutory supervisors and, therefore, has the burden of proof establishing their supervisory status. Specifically, the Employer maintains, in support of its position, that the LPNs ensure that the CNAs carry out their assignments, assign and schedule CNAs, approve their overtime, discipline the CNAs, if necessary, and complete or assist in preparing CNA evaluations. In addition, the Employer asserts that the LPNs’ supervisory status is buttressed by the possession of certain secondary indicia of supervisory authority. In this regard, the Employer points out that the LPNs are directed to “supervise” in their written job descriptions and are evaluated on this ability, handle “call offs” and have been named in grievances filed by CNAs.

Contrary to the Employer, the Petitioner maintains that the LPNs are not statutory supervisors, but rather more akin to lead persons. It argues that the LPNs’ authority to assign,

transfer and direct CNAs in their work is routine in nature, not requiring the use of independent judgment, and that the LPNs merely verify rather than approve overtime. Finally, the Petitioner argues that what evidence there is supporting the Employer's assertion that the LPNs possess statutory authority to discipline CNAs is weak and insufficient to establish supervisory status.

#### IV. Conclusions Regarding the Status of the LPNS:

With regard to assigning and transferring CNAs, I find that the roles of the LPNs are routine in nature and do not require the use of independent judgment. Although LPNs admittedly fill out daily assignment sheets and assign CNAs to certain rooms, such room assignments typically remain unchanged from day-to-day and are guided not by the level of skill possessed by the CNAs or the status of the residents to whom they provide care, but rather by merely dividing the number of residents by the number of CNAs. Similarly, the CNAs' break and lunch periods are pre-set by the Employer. Although the CNAs must notify a LPN before they take their breaks, either verbally or by signing out, it is also true that the LPNs typically notify another LPN or a supervisor before taking their own breaks. Thus, this is not indicative of any LPN approval of breaks. In any event, the Board has found the authority to approve breaks, under such circumstances, to be routine clerical judgment not requiring the exercise of independent judgment. *Loyalhanna Care Center*, 332 NLRB 933, 935 (2000). Finally, the record testimony regarding "other duty" assignments clearly establishes that LPNs do not differentiate among the CNAs when making such assignments. Instead they request volunteers to fill slots and if this method is unsuccessful in filling the vacancies, they go by rotation.

The record evidence demonstrates that the LPNs follow set routines and guidelines to the extent that they assign, transfer and call in CNAs. In analyzing their ability to assign, transfer and mandate, I am mindful of the fact that LPNs typically exercise this authority only at times when they are filling the role of house supervisor and even then, LPNs may only mandate that CNAs work overtime when their staffing level falls below the minimum levels set by the state. Moreover, any mandates that they effectuate must be done in accordance with guidelines enumerated in the CNAs' collective-bargaining agreement, which requires that volunteers be sought before mandating to fill a vacancy. Likewise, the LPNs do not have the authority to require anyone but the least senior CNA to work if they are unable to find a volunteer to fill a vacancy. Thus, the LPNs do not exercise independent judgment in mandating overtime or seeking out volunteers to fill vacancies. See, *Harborside Healthcare, Inc.*, supra.

The Employer's claim that LPNs are responsible for giving newly-hired CNAs their initial assignment is not supported by the record. The Employer cites no specific examples of this occurring and did not describe the process by which an LPN would make such an assignment. Thus, there is no indication that LPNs exercise independent judgment in making such assignments. DON Postin's mere assertion that the LPNs give newly-hired CNAs their initial assignment is not probative of whether the LPNs assign work using independent judgment. Postin cited no specific examples showing that this has occurred. Nor did she describe the process by which an LPN would make such an assignment.

Although the LPNs are not as constrained in their ability to "pull" or transfer CNAs from another unit, as they are in filling vacancies, the discretion required in making these transfers

does not rise to the level of independent judgment contemplated in Section 2(11) of the Act. Thus, they only “pull” from another unit in cases where their unit is short staffed despite the fact that the collective number of CNAs on both units meets the minimum staffing requirements. The LPNs merely check the census to determine if the transfer is warranted and pull the CNAs based on a pre-set rotation schedule. Transferring the CNAs, under these circumstances, does not confer supervisor status, given the absence of evidence that such transfers involve anything more than a routine determination as to the number of CNAs needed to serve a particular number of residents. *Northern Montana Health Care Center*, 324 NLRB 752, 754, enforcement granted in relevant part, *Northern Montana Health Care Center v. NLRB*, 178 F.3d 1089 (9<sup>th</sup> Cir. 1999). Assignments, like those made by the LPNs here, to equalize work, do not require the degree of discretion needed to confer supervisory status. See, e.g., *Bozeman Deaconess Hospital*, 322 NLRB 1107 (1997).

I also conclude that the degree of judgment exercised by the LPNs in directing the CNAs is insufficient to support a finding of supervisory status. In *Kentucky River*, upon which the Employer heavily relies, the Supreme Court stated: “Many nominally supervisory functions may be performed without the ‘exercise [of] such a degree of...judgment or discretion...as would warrant a finding’ of supervisory status under the Act.” *Kentucky River*, 532 U.S. at 713. The tasks performed by the CNAs are, for the most part, routine involving basic care functions such as feeding, showering and turning residents, which they perform pursuant to resident care plans. Under similar circumstances, the Board has found, post-*Kentucky River*, that charge nurses with the authority to make sure that CNAs perform their jobs properly and to call to their attention that a task has not been correctly performed does not require the use of independent judgment. *Beverly Health and Rehabilitation Services, Inc.*, 335 NLRB 635 (2001); *Franklin Home Health Agency*, 337 NLRB 826 (2002).

In regards to the single incident in the record where an LPN permitted a CNA to leave early due to a family emergency, I note that the CNA initially sought out the “house supervisor” for approval and that the LPN later informed an admitted supervisor of the employee’s departure. In any event, the Board has found that there is not any substantial degree of judgment involved in permitting an employee, who is too ill to work or who experiences a family emergency, to go home. *Loyalhanna Care Center*, supra. Likewise, the completion of, or input regarding, CNA evaluations by LPNs does not establish supervisory status on the part of the LPNs. *Harborside Healthcare, Inc.*, 330 NLRB at 1335. The evaluation forms do not contain a recommendation regarding pay increases or any other type of employment action affecting the CNAs and are almost identical to the evaluations prepared by the nurses found not to be supervisors in *Harborside*.

I also find that the weight of the record evidence regarding the LPNs’ purported authority to discipline CNAs militates against a finding that they are supervisors. The Employer’s proof rests primarily on a number of corrective actions showing that LPNs have signed corrective reports above the title “supervisor.” However, the fact that an individual signs an action as a “supervisor” does not make them a statutory supervisor. *Necedah Screw Machine Products*, 323 NLRB 574, 577 (1997). Moreover, only four of the corrective actions were supported by testimonial evidence describing the role that the LPN played in relation to the actions. The record testimony discloses that in two of the four situations the LPN merely signed on the

supervisor's line at the direction of a manager and did not even fill out the form. Thus, the LPN did not exercise any discretionary authority or independent judgment. In another action, involving LPN Beth Chafin, the record shows that Chafin filled out the action, but signed it only as a witness after having a discussion with a supervisor who had already decided to discipline the employee in question. Indeed, the corrective action form reflects that Chafin did not even check a level of discipline. In the final situation, where the LPN actually signed a verbal warning on the supervisor's line, the action was witnessed by an admitted supervisor. Moreover, the LPN could not recall whether she first conferred with the supervisor before issuing the discipline. Consequently, the record fails to establish in that instance that the LPN exercised independent judgment or discretion by issuing the corrective action form. The Board has held that in order to establish supervisory authority, an employer must demonstrate that an individual's participation in the disciplinary process leads to a personnel action without an independent review or investigation by other management personnel. *Franklin Home Health Agency*, 337 NLRB at 830 (citing *Beverly Health & Rehabilitation Services*, 335 NLRB 635.) Here, the Employer clearly has not met this burden.

Finally, secondary indicia is insufficient to confer supervisory status where the evidence fails to establish that the individual in dispute possess one or more of the Section 2(11), or primary, indicia. *Crittendon Hospital*, 328 NLRB 879 (1999). I have found that the LPNs do not possess any of the Section 2(11) indicia. Consequently, the secondary indicia proffered by the Employer does not satisfy its evidentiary burden of proof. The fact that the LPNs' job descriptions indicate that they "supervise" nursing personnel, is the type of "paper authority" which the Board has consistently found not to be sufficient to confer supervisory status in the absence of evidence that the employee actually performs the supervisory functions. *Pine Manor Nursing Home*, 238 NLRB 1654, 1655 (1978). Similarly, the acceptance of "call offs" and the fact that some LPNs have been named in grievances filed by CNAs over employment procedures do not support a finding of supervisory status.

Based on the foregoing, and careful review of the entire record and briefs of the parties, I conclude that the Employer has failed to meet its burden of establishing that the LPNs are supervisors within the meaning of Section 2(11) of the Act. Accordingly, I find that the LPNs are not statutory supervisors and will direct an election in a unit comprised of the Employer's LPNs.

The cases cited by the Employer, in its brief, do not require a contrary finding. In the primary case relied on by the Employer in support of its position, *NLRB v. Kentucky River Community Care, Inc.*, supra, the Supreme Court rejected the Board's rationale that individuals in health care facilities, who exercised authority in directing less skilled employees based on ordinary professional or technical judgment, were not statutory supervisors. However, the Court in *Kentucky River* did not hold that all nurses, who worked with less skilled employees, were supervisors within the meaning of Section 2(11) of the Act. Rather, the Court placed the burden of proving supervisory status on the party claiming that such status exists. Here, the Employer has not met its evidentiary burden of establishing that the LPNs are supervisors; indeed, the record evidence does not establish that the LPNs possess any of the indicia set forth in Section 2(11) of the Act. Any authority exercised by the LPNs over other employees is routine not requiring the exercise of independent judgment. Likewise, the Supreme Court's decision in

*NLRB v. Health Care & Retirement Care of America*, 511 U.S. 571 (1994), cited by the Employer in its brief, does not support its position that the LPNs are supervisors. Although the LPNs' duties and responsibilities are in furtherance of the Employer's interest, the LPNs do not exercise independent judgment in any of their job-related activities involving other employees.

The Board cases, both pre- and post- *Kentucky River*, cited by the Employer in its brief, are clearly distinguishable. In *American Commercial Barge Lines Company*, 337 NLRB 1070 (2002), the tugboat pilots found to be supervisors were in charge of the boat for a 6-hour shift each day with the independent authority to change the assignments of crew members and even to make and assign duties to the "call watch" men. The type of daily discretion, possessed and exercised by the tugboat pilots in *American Commercial Barge Lines*, is not possessed and exercised by the LPNs in the subject case. Moreover, the decisions in *Wedgewood Health Care Center*, 267 NLRB 525 (1983); *Riverside Health Care Center*, 304 NLRB 861 (1991); *River Manor Nursing Center*, 270 NLRB 1008 (1984); *Northwoods Manor*, 260 NLRB 854 (1984); *Riversedge Hospital, Inc.*, 264 NLRB 1094 (1982); *Washington Nursing Home*, 321 NLRB 366 (1996); *Mountaineer Park, Inc.*, 343 NLRB No. 135 (2004); and *Formco, Inc.*, 254 NLRB 127 (1979), do not support the Employer's position that the LPNs here are statutory supervisors. In the cited cases, the nurses or other purported supervisors independently issued discipline and/or warnings that could result in immediate or future discipline pursuant to a progressive disciplinary system. Here, as discussed in detail above, the authority of the LPNs to issue discipline is insufficient to establish supervisory status under *Kentucky River*.

Likewise, the two ALJ decisions, *Wilshire at Lakewood*, 2002 WL 1723725 (2002) and *Fuji Foods, U.S., Inc.*, 2002 WL 1774044 (2002), as well as the various appellate court decisions [e.g., *NLRB v. Attleboro Associates, Ltd.*, 176 F.3d 154 (3<sup>rd</sup> Cir. 1994); *Grancare, Inc. v. NLRB*, 137 F.3d 372 (6<sup>th</sup> Cir. 1998); *NLRB v. Passavant Retirement & Health Care Center*, 149 F.3d 243 (3<sup>rd</sup> Cir. 1998); and *NLRB v. Quinnipiac College*, 256 F.3d 68 (2<sup>nd</sup> Cir. 2001)], cited by the Employer, do not establish that the LPNs here are supervisors. Initially, I would note I am not bound by an ALJ, or appellate court, decision unless adopted by the Board. However, the findings of the ALJs and courts in the cited cases do not support the Employer's position since the individuals found to be supervisors in those instances clearly exercised Section 2(11) authority, albeit on a somewhat sporadic basis. Here, the LPNs simply do not possess or exercise, at any time, Section 2(11) indicia sufficient to establish supervisory status.

Finally, *First Healthcare Corporation d/b/a Hillhaven Kona Healthcare Center*, 323 NLRB 1171 (1997), cited by the Employer in its brief in support of its apparent contention that the LPNs' role in the evaluation of CNAs establishes that the LPNs are supervisors, is inapposite. In *Hillhaven*, there was a direct correlation between the CNA evaluations prepared by the RNs and LPNs and the merit increases or bonuses awarded the CNAs. Here, the record establishes that the unit managers currently prepare the evaluations on the CNAs with only input from the LPNs. Moreover, on the few occasions in the past where LPNs completed CNA evaluation forms, they were approved by a higher management official. More importantly, there is no evidence of any correlation between the CNA evaluations here and any pay increases or other employment action affecting the CNAs. See, *Harborside Healthcare, Inc.*, supra.

## V. Conclusions and Findings:

Based upon the entire record in this matter, and in accordance with the above discussions, I conclude and find as follows:

1. The hearing officer's rulings made at the hearing are free from prejudicial error and are affirmed.
2. The Employer is engaged in commerce within the meaning of the Act, and it will effectuate the purposes of the Act to assert jurisdiction in this case.
3. The Petitioner is a labor organization within the meaning of Section 2(5) of the Act.
4. The Petitioner claims to represent certain employees of the Employer.
5. A question affecting commerce exists concerning the representation of certain employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.
6. The following employees of the Employer constitute a unit appropriate for the purpose of collective bargaining within the meaning of Section 9(b) of the Act:

**All full-time and regular part-time licensed practical nurses (LPNs) employed by the Employer at its Huntington, West Virginia facility, excluding all employees currently represented by the Petitioner, all office clerical employees, all other employees, and all registered nurses and all other professional employees, all guards and all department heads, unit managers and all other supervisors as defined in the Act.**

### **DIRECTION OF ELECTION**

The National Labor Relations Board will conduct a secret ballot election among the employees in the unit found appropriate above. The employees will vote whether or not they wish to be represented for purposes of collective bargaining by The Health Care and Social Service Union, SEIU, District 1199, WV/KY/OH, AFL-CIO. The date, time, and place of the election will be specified in the notice of election that the Board's Regional Office will issue subsequent to this Decision.

#### **A. VOTING ELIGIBILITY**

Eligible to vote in the election are those in the unit who were employed during the payroll period ending immediately before the date of this Decision, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Employees engaged in any economic strike, who have retained their status as strikers and who have not been permanently replaced are also eligible to vote. In addition, in an economic strike which commenced less than 12 months before the election date, employees engaged in such strike who have retained their status as strikers but who have been permanently replaced, as well as their



replacements, are eligible to vote. Unit employees in the military services of the United States may vote if they appear in person at the polls.

Ineligible to vote are (1) employees who have quit or been discharged for cause since the designated payroll period; (2) striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the election date; and (3) employees who are engaged in an economic strike that began more than 12 months before the election date and who have been permanently replaced.

## **B. EMPLOYER TO SUBMIT LIST OF ELIGIBLE VOTERS**

To ensure that all eligible voters may have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election should have access to a list of voters and their addresses, which may be used to communicate with them. *Excelsior Underwear, Inc.*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon Company*, 394 U.S. 759 (1969).

Accordingly, it is hereby directed that within 7 days of the date of this Decision, the Employer must submit to the Regional Office an election eligibility list, containing the full names and addresses of all the eligible voters. *North Macon Health Care Facility*, 315 NLRB 359, 361 (1994). This list must be of sufficiently large type to be clearly legible. To speed both preliminary checking and the voting process, the names on the list should be alphabetized (overall or by department, etc.). Upon receipt of the list, I will make it available to all parties to the election.

To be timely filed, the list must be received in the Regional Office, Region 9, National Labor Relations Board, 3003 John Weld Peck Federal Building, 550 Main Street, Cincinnati, Ohio 45202-3271, on or before **May 27, 2005**. No extension of time to file this list will be granted except in extraordinary circumstances, nor will the filing of a request for review affect the requirement to file this list. Failure to comply with this requirement will be grounds for setting aside the election whenever proper objections are filed. The list may be submitted by facsimile transmission at (513) 684-3946. Since the list will be made available to all parties to the election, please furnish **two** copies, unless the list is submitted by facsimile, in which case no copies need be submitted. If you have any questions, please contact the Regional Office.

## **C. NOTICE OF POSTING OBLIGATIONS**

According to Section 103.20 of the Board's Rules and Regulations, the Employer must post the Notices to Election provided by the Board in areas conspicuous to potential voters for a minimum of 3 working days prior to the date of the election. Failure to follow the posting requirement may result in additional litigation if proper objections to the election are filed. Section 103.20(c) requires an employer to notify the Board at least 5 full working days prior to 12:01 a.m. of the day of the election if it has not received copies of the election notice. *Club Demonstration Services*, 317 NLRB 349 (1995). Failure to do so estops employers from filing objections based on nonposting of the election notice.

## **RIGHT TO REQUEST REVIEW**

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570-0001. This request must be received by the Board in Washington by 5 p.m., EDST on **June 3, 2005**. The request may **not** be filed by facsimile.

Dated at Cincinnati, Ohio this 20<sup>th</sup> day of May 2005.

/s/ Gary W. Muffley

Gary W. Muffley, Regional Director  
Region 9, National Labor Relations Board  
3003 John Weld Peck Federal Building  
550 Main Street  
Cincinnati, Ohio 45202-3271

### **Classification Index**

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